



August 22, 2001

Ms. Julie Reagan Watson
Assistant General Counsel
Texas Department of Human Services
P.O. Box 149030
Austin, Texas 78714-9030

OR2001-3724

Dear Ms. Watson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 150989.

The Texas Department of Human Services (the "department") received a request for information regarding "Cheyenne House, Advantage Healthcare Services; and/or Pulse Home Health." You state that some of the requested information will be released to the requestor. You claim that the submitted information is excepted from disclosure under section 552.101 of the Government Code in conjunction with the informer's privilege, common law privacy, and various state and federal statutes. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. You assert that the documents in Attachment C are excepted from disclosure under section 552.101 of the Government Code in conjunction with section 142.009(d) of the Health and Safety Code. Section 142.009(d) provides as follows:

The reports, records, and working papers used or developed in an investigation made under [Chapter 142] are confidential and may not be released or made public except:

(1) to a state or federal agency;

- (2) to federal, state, or local law enforcement personnel;
- (3) with the consent of each person identified in the information released;
- (4) in civil or criminal litigation matters or licensing proceedings as otherwise allowed by law or judicial rule;
- (5) on a form developed by the department that identifies any deficiencies found without identifying a person, other than the home and community support services agency;
- (6) on a form required by a federal agency if:
 - (A) the information does not reveal the identity of an individual, including a patient or a physician or other medical practitioner;
 - (B) the service provider subject to the investigation had a reasonable opportunity to review the information and offer comments to be included with the information released or made public; and
 - (C) the release of the information complies with any other federal requirement; or
- (7) as provided by Section 142.0092.

Health & Safety Code § 142.009(d). You argue that the documents in Attachment C constitute reports, records, and working papers that were used or developed during a complaint investigation made under section 142.009(c) of the Health and Safety Code. You have provided no information that would allow us to conclude that any of the exceptions to confidentiality in section 142.009(d) apply in this instance. Based on your representations and our review of the submitted information, we conclude that the department must withhold the information in Attachment C pursuant to section 552.101 of the Government Code in conjunction with section 142.009(d) of the Health and Safety Code.¹

Next, you contend that certain information in the federal forms submitted as Attachment D, Form HCFA 2567, Statement of Deficiencies and Plan of Correction, is excepted from

¹ We therefore need not address the remaining arguments pertaining to Attachment C.

disclosure under section 552.101 of the Government Code in conjunction with federal regulations and section 142.009(d)(6) of the Health and Safety Code. Federal regulations require the department to release the HCFA 2567 forms, which contain a statement of deficiencies and plan of correction, provided that (1) no information identifying individual patients, physicians, other medical practitioners, or other individuals shall be disclosed, and (2) the provider whose performance is being evaluated has had a reasonable opportunity to review the report and to offer comments. *See* 42 C.F.R. §§ 401.126, .133; Open Records Decision No. 487 at 5 (1988); *see also* Health & Safety Code § 142.009(d)(6). You explain that the facility has offered comments in response to each evaluation and, therefore, has had a reasonable opportunity to review the report. We agree that the signature of the facility's representative on the forms, together with the facility's comments, indicate that the facility has had a reasonable opportunity to review the report and offer comments. You claim that the identifying information of the individuals found in the federal form is confidential under section 142.009(d)(6). Based on your representations and our review of the submitted information, we conclude that the department must withhold the identifying information of all individuals in Attachment D under section 142.009(d)(6).

In addition, you contend that some of the documents in Attachment D are drafts of Form HCFA 2657 that must be withheld under section 142.009(d)(6) of the Health & Safety Code. You state that "[t]hese documents are not signed by the provider and do not contain the provider's comments." Based upon this representation and our review of the submitted information, we agree that the documents you have marked in Attachment D must be withheld by the department under section 142.009(d)(6).

Next, you contend that certain information in the state forms submitted as Attachment E, Statement of Licensing Violations and Plan of Correction, is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 142.009(d)(5) of the Health and Safety Code. As noted above, section 142.009(d) states that "reports, records, and working papers used or developed in an investigation . . . are confidential and may not be released or made public except: (5) on a form developed by the department that identifies any deficiencies found without identifying a person, other than the home and community support services agency." Health & Safety Code § 142.009(d)(5). You acknowledge that section 142.009(d)(5) requires the department to release this state form; however, you contend the department must withhold any identifying information of an individual contained within the form. You claim that the identifying information of the representatives of the facility in the forms is confidential under section 142.009(d)(5). We agree that the identifying information of most of the agency's representatives are confidential under section 142.009(d)(5). However, one of the representatives is the owner of the agency. A "home and community support services agency" is defined as "a person who provides home health, hospice, or personal assistance services for pay or other consideration in a client's residence, an independent living environment, or another appropriate location." *Id.* § 142.001(12). "Person" is defined as "an individual, corporation, or association." *Id.* § 142.001(21). As a corporation or association, a home and community support services

agency is a person who provides home health, hospice, or personal assistance services for pay or other consideration. We believe that the owner of an agency is a person who falls within the purview of the "home and community support services agency" definition. Thus, the name of an agency's owner is not protected under section 142.009(d)(5) and must be released because the section requires the release of a home and community support services agency from the state form.

In addition, you contend that certain information in Attachment E is made confidential under the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides in pertinent part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b), (c). The MPA requires that any subsequent release of medical records be consistent with the purposes for which a governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Thus, the MPA governs access to medical records. Open Records Decision No. 598 (1991). Moreover, information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code § 159.002(a), (b), (c); Open Records Decision No. 598 (1991). We have marked the information in Attachment E that is subject to the MPA and may be released by the department only in accordance with that statute.

Some of the records in Attachment E are not state forms contemplated by section 142.009(d)(5). Because these records were used or developed in an investigation under chapter 142, they are confidential under section 142.009(d). We have marked these records.

Next, you contend that the information in Attachment F is made confidential under the MPA. We have marked the information in Attachment F that is subject to the MPA and may be released by the department only in accordance with that statute.

Next, you contend that portions of the documents in Attachment F are confidential under section 552.101 of the Government Code in conjunction with sections 12.003 and 21.012 of the Human Resources Code. These statutes prohibit the disclosure of information concerning clients of a state plan for medical assistance, except for a purpose directly

connected with the administration of the plan. *See* Open Records Decision Nos. 584 (1991), 166 (1977). Section 12.003 of the Human Resources Code provides in relevant part:

(a) Except for purposes directly connected with the administration of the department's assistance programs, it is an offense for a person to solicit, disclose, receive, or make use of, or to authorize, knowingly permit, participate in, or acquiesce in the use of the names of, *or any information concerning*, persons applying for or receiving assistance if the information is directly or indirectly derived from the records, papers, files, or communications of the department or acquired by employees of the department in the performance of their official duties.

Hum. Res. Code § 12.003(a) (emphasis added). In Open Records Decision No. 584 (1991), this office concluded that "[t]he inclusion of the words 'or any information' juxtaposed with the prohibition on disclosure of the names of the department's clients clearly expresses a legislative intent to encompass the broadest range of individual client information, and not merely the clients' names and addresses." Consequently, it is the specific information pertaining to individual clients, and not merely the clients' identities, that is made confidential under section 12.003. *See* Hum. Res. Code § 21.012 (department shall provide safeguards restricting use or disclosure of information concerning applicants for or recipients of department's assistance programs to purposes directly connected with administration of programs); *see also* Open Records Decision No. 166 (1977). Here, release of some of the information you claim is confidential under section 12.003 of the Human Resources Code would not be for purposes directly connected with the administration of the department. Therefore, the information we have marked in Attachment F is confidential under section 12.003 of the Human Resources Code and must be withheld from disclosure under section 552.101 of the Government Code.

In addition, the rest of the records in Attachment F are records that were used or developed in an investigation under chapter 142, and they are therefore confidential under section 142.009(d). We have marked these records.

Next, you claim that the documents in Attachment G are records provided to the department by the healthcare facilities as required under section 142.004 of the Health & Safety Code, and that these records are confidential under section 142.004(d). Section 142.004(d) provides:

Information received by the department relating to the competence and financial resources of the applicant or a controlling person with respect to the applicant is confidential and may not be disclosed to the public.

Health & Safety Code § 142.004(d). Based on your representations and our review of the submitted information, we agree that the information in Attachment G is confidential and must be withheld by the department under section 142.004(d).

Next, you contend that the information you have marked in Attachment H is information provided to the department by healthcare facilities as required under section 142.004 of the Health & Safety Code, and that this information is confidential under section 142.004(d) because it relates to the facilities' financial resources and competence. Based on your representations and our review of the submitted documents, we agree that the information you have marked in Attachment H is confidential and must be withheld by the department under section 142.004(d).

Finally, you also contend that the social security numbers in Attachment H are confidential under section 552.101 in conjunction with federal law. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in Attachment H are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number in Attachment H, you should ensure that no such information was obtained or is maintained by the department pursuant to any provision of law enacted on or after October 1, 1990.

In summary, the department must withhold the information in Attachment C and the marked information in Attachments E and F pursuant to section 552.101 of the Government Code in conjunction with section 142.009(d) of the Health and Safety Code. The department must withhold individuals' identifying information and the drafts of Form HCFA 2567 in Attachment D under section 142.009(d)(6). The department must withhold individuals' identifying information in Attachment E under section 142.009(d)(5). However, the department must release the identifying information of the facility's owner under section 142.009(d)(5). The department must withhold the MPA information we have marked in Attachments E and F. The information we have marked in Attachment F is confidential under section 12.003 of the Human Resources Code and section 142.009(d) of the Health and Safety Code and must be withheld from disclosure under section 552.101 of the Government Code. The information in Attachment G and the information the department marked in Attachment H are confidential and must be withheld by the department under section 142.004(d) of the Health and Safety Code. In addition, prior to releasing any social security number in Attachment H, the department should ensure that no such information

was obtained or is maintained by the department pursuant to any provision of law, enacted on or after October 1, 1990. 42 U.S.C. § 405(c)(2)(C)(viii).

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

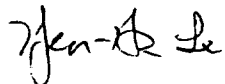
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for

contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Yen-Ha Le".

Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/DKB/seg

Ref: ID# 150989

Enc. Marked documents

c: Ms. Dee Dee Jahns-Garcia
Roper ★ Pope, L.L.P.
One McKinney Plaza, Suite 1160
3232 McKinney Avenue
Dallas, Texas 75204
(w/o enclosures)